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In the

Supreme Court of the United States

OCTOBER TERM 1966

No. 718

JOHN HERBERT CUDMORE,

Petitioner,

v.

RICHARDSON-MERRELL, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals for the
5th Supreme Judicial District of Texas

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Petitioner, John Herbert Cudmore, prays that a Writ of Certiorari issued to review the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas entered in the above entitled case on December 17, 1965.

I. Citation to Opinion Below

The opinion of the Court of Civil Appeals, printed in Appendix "A", page A-1, is not officially reported but is printed in 398 S.W. 2d 640 (1965). The Supreme Court of Texas wrote no opinion in refusing Petitioner's Application for a Writ of Error.

II. Jurisdiction

The judgment of the Court of Civil Appeals was entered on December 17, 1965. Appendix "A" hereto, page A-13. The order denying Petitioner's Motion for Rehearing by the Court of Civil Appeals was rendered and entered on January 28, 1966, Appendix "A" hereto, pages A-13, 14 Petitioner's Application for Writ of Error to the Supreme Court of Texas, timely filed, was refused, no reversible error, on July 6, 1966, Appendix "A" hereto, page A-14. The order denying Petitioner's motion for a rehearing of his Application for Writ of Error by the Texas Supreme Court was rendered and entered on July 27, 1966, Appendix "A" hereto, page A-15. The Court of Civil Appeals thus became in this case the highest court of the state in which a decision could be had. *Panhandle Eastern Pipeline Company v. Calvert*, 347 U.S. 157, 98 L. Ed. 583, 74 S. Ct. 396 (1954).

The jurisdiction of this court is invoked under 28 U.S.C., § 1257 (3) because Rules 277 and 279, Texas Rules of Civil Procedure, are invalid as applied by the Texas courts in this case because such application has resulted in a denial of due process and equal protection of law and of rights, privileges and immunities of Petitioner guaranteed under the Fourteenth Amendment of the Constitution of the United States.

III. Question Presented

Petitioner Cudmore, a citizen of Texas and the United States, suffered permanent injury in the nature of the growth of cataracts on both of his eyes, loss of hair and flaking of skin caused by his taking a drug known as "MER/29" which drug was manufactured and marketed nationally by the Respondent a Delaware corporation. The Petitioner brought suit in a Texas state trial court in Dallas County, Texas, for breach of warranty, negligence and gross negligence. Respondent denied liability and trial was to a jury. Because of the requirements of Rules 277 and 279, Texas Rules of Civil Procedure, the case was submitted to the jury in the form of "Special Issues." The special issues as submitted to the jury did not contain any issues allowing the jury to pass on plaintiff's theory of breach of warranty by respondent, although plaintiff had plead this theory of cause of action and had introduced evidence to support the theory of his cause of action. The question presented is: **(1) Whether the Texas courts through the use of the "special issue" charge to jury have the power to deny Petitioner a jury trial on one of the theories of his cause of action which was properly pled and proved, in violation of Due Process, Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment to the Constitution of the United States.**

IV. Constitutional Provision and Statutes Involved

1. The constitutional provision involved in this case is the Fourteenth Amendment to the Constitution of the United States.

2. The statutory provisions involved are Rules 277 and 279, Texas Rules of Civil Procedure. These are printed in Appendix "B" hereto, (page B-1)..

V. Statement

1. Material Facts

("Tr." herein refers to the Transcript, "Supp. Tr." herein refers to the Supplemental Transcript, "SF" refers to the Statement of Facts. These are separate documents under Texas appellate practice).

In January, 1960, Petitioner John Cudmore, a former football coach, suffered a heart attack. In August, 1960, Petitioner's doctor prescribed that he take the drug MER/29 which was formerly manufactured and marketed nationally by Respondent. Petitioner consumed one capsule of the drug per day pursuant to his doctor's instructions. Thereafter, in March, 1961, his doctor instructed Petitioner to cease taking the drug, (Tr. 18-19). Prior to the time Petitioner ceased taking the drug, he found that his vision was becoming blurred, his skin was becoming dry and scaley, and his hair was falling out. Petitioner also entered into a severe state of depression. After he ceased taking the drug MER/29, Petitioner's hair and skin problems terminated, but the blurred vision became increasingly acute. The vision problem was subsequently diagnosed as bilateral cataracts in both eyes. All of these problems were diagnosed as caused by the taking of the drug, MER/29 (S.F. 149, 241-249). The Respondent made clinical tests of the drug on numerous animals. In almost every instance the animals subsequently developed eye diso lers. Despite this, the Respondent marketed the

drug. After the drug was on the market a short time, Respondent received further reports that the drug caused cataracts. In December, 1961, the company issued a drug warning letter. In December, 1962, Respondent withdrew the drug from the market.

Petitioner brought suit for breach of warranty, both express and implied, negligence and gross negligence (Tr. 3-15). At the trial, evidence was introduced that the drug MER/29 had caused his injuries (S.F. 246-249). Petitioner also produced evidence that five persons out of 86 in the Dallas area who had taken the drug developed cataracts as a result thereof. (S.F. 149-151). He also introduced evidence that numerous animals which had been given the drug developed eye disorders. (S.F. 280-281, 286, 292-293).

In submitting the charge to the jury in the form of Special Issues the trial court framed special issues asking the jury whether MER/29 taken by Petitioner was the proximate cause of his damages (Special Issues 1 to 6, Tr. 37-38). The court defined proximate cause in part as that cause of result which "ought reasonably to have been foreseen by a person of ordinary care in an appreciable class or number of persons in the light of attending circumstances." (Tr. 36) Petitioner timely objected to these special issues and the court's definition of proximate cause to be used therewith. (Tr. 20-23, Supp. Tr. 3-6) Petitioner tendered the court special issues predicated on "producing cause" together with a proper definition of "producing cause." (Tr. 21,22) In the alternative, the Petitioner requested that if the court did

use the term proximate cause in conjunction with these special issues, that the requirement of foreseeability be stricken from the definition. (Tr. 22, Supp. Tr. 3)

The special issue charge as presented to the jury contained definitions that required the jury in answering the special issues to base its answers upon whether the results of the use of the drug were reasonably foreseeable by the Respondent prior to March 2, 1961, the date Petitioner stopped taking the drug. The jury was permitted in each instance to pass only on the question of whether the Respondent was negligent in marketing the drug because the jury was restricted the definitions to find or refuse to find that during the time the drug was being consumed by Petitioner the Respondent reasonably could foresee the injurious results of taking the drug.

Similarly the definition of "abreaction" contained the element of "one which could not have been reasonably foreseen in an appreciable class or number of potential users prior to March 2, 1961 (Tr. 36). Likewise, the definition of "unfit and unmerchantable" was defined as "that inherent condition which, after weighing utility against potential danger, means that a reasonable person would say that its use is injudicious." This definition required the jury to find that the Respondent could foresee the "potential danger" which was another way of inducing the element of reasonable foreseeability on the part of the Respondent before the jury could find that the drug was unfit and unmerchantable (Tr. 36).

The jury was alert to and concerned about the definition of "proximate cause" because the jury sent a note to the court after it had retired to deliberate and answer the Special Issues. This note read as follows: "Must all stipulations contained in the definition of 'proximate cause' bear equal weight in answering Special Issues"? The court answered "the answer is yes" (Tr. 46).

2. How the federal question was presented in the state courts

Before the case was submitted to the jury, Petitioner filed objections and exceptions to the Special Issue charge of the court, including the following:

> "The Plaintiff objects to the use of the definition of 'proximate cause' in its entirety for the reason that said definition is improper as a matter of law; and further, that it is improper as a matter of law as to issues on warranty; and further, that the said proper issue would be that of a producing cause, * * *"

The Plaintiff then said that a "proper issue would be that of a producing cause, the same being out of the natural sequence of events from which the acts or conduct of the drug in question; and said acts and conducts producing the damages to the plaintiff; and further, that the term, use of 'proximate cause' or 'producing cause' under warranty issue should not be restricted in any manner by the use of 'appreciable class or number of persons', and with the further restriction, 'in the light of the attending circumstances'."

The Plaintiff then objected that in a warranty the issue of "foreseeability should not be tendered." (Supp. Tr. 3)

The Plaintiff also objected to the definition of "abreaction" on the basis that there is "no evidence to sustain the insertion of a definition of a statement requiring foreseeability in an appreciable class or number of potential users."

Plaintiff objected to Special Issue No. 2 as follows:

> "Said issue is wrongfully conditioned upon proximate cause and should properly be defined as producing cause and if said issue is tendered, then it should be coupled with a proper instruction of producing cause as follows:
>
> That term "producing cause" as used in this charge, means a cause which in a natural and continuous sequence, either alone or in conjunction with pre-existing bodily conditions, brings about the condition of incapacity, and without which cause, such incapacity would not have occurred. There may be more than one producing cause of a person's incapacity." (TR-21, 22)

Plaintiff also objected to Special Issues No. 2, 4 and 6 "for the reason that the same uses the term "proximate", and should use "producing cause" as previously defined in these objections; and further, that, as a matter of law, the uncontroverted evidence is that the ingestion of the drug MER/29 would cause cataracts" (Tr. Supp. -5-6).

Plaintiff also objected to the definition of "unfit and unmerchantable" for including the phrase "weighing utility against potential danger" and attempted to submit a more suitable definition that "unfit and unmerchantable" means that inherent condition which means that a reasonable person could not say that its use is injudicious." (Supp. Tr. -4, 5).

Plaintiff also objected to Special Issue 16 because it was just a restatement of the circumstances of "foreseeability,

which, in fact, is improper on the warranty theory." (Supp. Tr. -7, 8).

Plaintiff also objected to Special Issue 18 as "another restatement of foreseeability, and as such is duplicitious and moreover, is improper as a matter of law as regards warranty." (Supp. Tr. -8)

The trial court refused to submit to the jury any of plaintiff's issues and definitions. (Supp. Tr. -9) The jury tried to award plaintiff $28,250 (Tr. 42) not knowing the effect of their answers to the Special Issues. (Tr. 42)

On appeal to the Texas Court of Civil Appeals the following points were preserved and argued to the said court:

"Point of Error No. Four

"The Court erred in its charge to the jury in defining 'Proximate Cause', as that term was used in Special Issues 2, 4 and 6, as that cause which produces a result which 'ought reasonably' to have been foreseen by a person of ordinary care in an appreciable class or number of persons in the light of attending circumstances."

"Point of Error No. Five

"The Court erred in overruling Appellant's objection to Special Issues 2, 4 and 6 of the Court's charge, which objection was that said issues were improperly predicated on proximate cause as defined by the Court and should properly be predicated on 'Producing Cause' as defined by Appellant."

"Point of Error No. Six

"The Court erred in refusing Appellant's tendered definition of 'Producing Cause' to be used in conjunction with Special Issues 2, 4, and 6, which was 'that cause,

which in a natural and continuous sequence, either alone or in conjunction with pre-existing bodily condition, brings about the incapacity, and without which cause such incapacity could not have occurred. There may be more than one producing cause of a person's incapacity.'"

"Point of Error No. Seven

"The Court erred in its charge to the jury in defining proximate cause, as that term was used in Special Issues 2, 4 and 6, as a cause which produces a result foreseeable 'in an appreciable class or number of persons.'"

"Point of Error No. Eight

"The Court erred in including in its definition of 'Unfit and Unmerchantable' the qualifying phrase, 'after weighing utility against potential danger.'"

"Point of Error No. Nine

"The Court erred in not submitting the Appellant's tendered definition of 'Unfit and Unmerchantable', which was as follows: 'Unfit and unmerchantable means that inherent condition which a reasonable person would say makes the use of the product injudicious.'"

"Point of Error No. Ten

"The Court erred in defining the term 'Abreaction' as, in part, 'one which could not have been reasonably foreseen in an appreciable class or number of potential users prior to March 2, 1961.'"

"Point of Error No. Eleven

"The Court erred in overruling the Appellant's objection to Special Issue No. 15, for the reason that the definition of the term 'Abreaction', as used in said special issue, was in error.'"

After the trial court's judgment was affirmed by the Court of Civil Appeals and Plaintiff's Motion for Rehearing was overruled by the said court, Plaintiff then applied for a Writ of Error to the Supreme Court of Texas urging the following points:

> "**Fourth Point.** The Court of Civil Appeals erred in holding that the Trial Court properly conditioned Petitioner's cause of action of implied warranty on the definition of 'proximate cause' which required in part, a finding of a cause which produces a result which ought reasonably to have been foreseen by a person of ordinary care in an appreciable class or number of persons in the light of attending circumstances."
>
> "**Fifth Point.** The Court of Civil Appeals erred in holding that the Trial Court properly predicated Petitioner's cause of action on implied warranty as contained in Special Issues No. 2, 4 and 6 on proximate cause as defined by the Court, rather than on producing cause as defined by the Petitioner."
>
> "**Sixth Point.** The Court of Civil Appeals erred in holding that the Trial Court properly refused Petitioner's tendered definition of 'producing cause' to be used in conjunction with Special Issues 2, 4 and 6, which was "that cause, which in a natural and continuous sequence, either alone or in conjunction with pre-existing bodily injury, brings about the incapacity and without which cause, such incapacity would not have occurred. There may be more than one producing cause of a person's incapacity.'"
>
> "**Seventh Point.** The Court of Civil Appeals erred in holding that the Trial Court properly submitted to the jury Special Issue No. 16, inquiring whether from the present state of ordinary care have anticipated that the produce MER/29 (triparanol) could cause cataracts in the lens of the human eye."

"**Ninth Point.** The Court of Civil Appeals erred in holding that the Trial Court correctly defined the term 'abreaction' as a reaction 'which could not have been reasonably foreseen in an appreciable class or number of potential users prior to March 2, 1961.'"

"**Tenth Point.** The Court of Civil Appeals erred in holding that the Trial Court properly defined the term 'abreaction' as used in Special Issue No. 15."

"**Eleventh Point.** The Court of Civil Appeals erred in holding that the Trial Court properly submitted Special Issue No. 15 questioning whether the Petitioner's injury resulted from an abreaction he had to the product in question."

"**Twelfth Point.** The Court of Civil Appeals erred in holding that the Trial Court properly defined 'proximate cause' as that term was used in Special Issues 2, 4 and 6, as a cause which produces a result foreseeable in an appreciable class or number of persons."

"**Thirteenth Point.** The Court of Civil Appeals erred in holding that the Trial Court properly defined 'unfit and unmerchantable' as that inherent condition which after weighing utility against potential danger, a reasonable person would say makes the use of the product injudicious."

The Supreme Court of Texas refused Petitioner's Application for Writ of Error. Petitioner filed a Motion for Rehearing which presented to the Supreme Court in "Seventh Point" the constitutional issues. The points were:

"**Fourth Point.** This Honorable Court erred in not granting the Application for Writ of Error on the Fourth point of error, which reads, 'The Court of Civil Appeals erred in holding that the Trial Court properly conditioned Petitioner's cause of action of implied warranty on the definition of "proximate cause" which required

in part, a finding of a cause which produces a result which ought reasonably to have been foreseen by a person of ordinary care in an appreciable class or number of persons in the light of attending circumstances.'"

"**Fifth Point.** This Honorable Court erred in not granting the Application for Writ of Error on the fifth point of error, which reads, 'The Court of Civil Appeals erred in holding that the Trial Court properly predicated Petitioner's cause of action on implied warranty as contained in Special Issues No. 2, 4 and 6 on proximate cause as defined by the Court, rather than on producing cause as defined by the Petitioner.'"

"**Sixth Point.** This Honorable Court erred in not granting the Application for Writ of Error on the sixth point of error, which reads, 'The Court of Civil Appeals erred in holding that the Trial Court properly refused Petitioner's tendered definition of "producing cause" to be used in conjunction with Special Issues 2, 4, and 6, which was "that cause, which in a natural and continuous sequence, either alone or in conjunction with pre-existing bodily injury, brings about the incapacity and without which cause, such incapacity would not have occurred. There may be more than one producing cause of a person's incapacity."'"

"**Seventh Point.** This Honorable Court erred in refusing Petitioner's Application for Writ of Error for the reason that the trial court erred in failing to grant the Petitioner a trial by jury of his cause of action against the Respondent based on the breach of implied warranty of fitness in violation of the Constitution of the State of Texas, and the Fourteenth Amendment to the Constitution of the United States of America."

"**Eighth Point.** This Honorable Court erred in not granting the Application for Writ of Error on the eighth point of error, which reads, "The Court of Civil Appeals erred in holding that the trial court properly submitted to the jury Special Issue No. 16, inquiring whether from the present state of medical knowledge the Respondent

could in the exercise of ordinary care have anticipated that the product MER/29 (triparanol) could cause cataracts in the lens of the human eye."

"**Ninth Point.** This Honorable Court erred in not granting the Application for Writ of Error on the ninth point of error, which reads, 'The Court of Civil Appeals erred in holding that the jury's answer to Special Issue No. 16 constituted a defense to an action on an implied warranty of fitness."

"**Tenth Point.** This Honorable Court erred in not granting the Application for Writ of Error on the tenth point of error, which reads, 'The Court of Civil Appeals erred in holding that the trial court correctly defined the term "abreaction" as a reaction "which could not have been reasonably foreseen in an appreciable class or number of potential users prior to March 2, 1961."'"

"**Eleventh Point.** This Honorable Court erred in not granting the Application for Writ of Error on the eleventh point which reads, 'The Court of Civil Appeals erred in holding that the trial court properly defined the term "abreaction" as used in Special Issue No. 15.'"

"**Twelfth Point.** This Honorable Court erred in not granting the Application for Writ of Error on the twelfth point of error, which reads, "The Court of Civil Appeals erred in holding that the trial court properly submitted Special Issue No. 15 questioning whether the Petitioner's injury resulted from an abreaction he had to the product in question.'"

"**Thirteenth Point.** This Honorable Court erred in not granting the Application for Writ of Error on the thirteenth point of error, which reads, 'The Court of Civil Appeals erred in holding that the trial court properly defined "proximate cause" as that term was used in Special Issues 2, 4, and 6, as a cause which produces a result foreseeable in an appreciable class or number of persons.'"

> "Fourteenth Point. This Honorable Court erred in not granting the Application for Writ of Error on the fourteenth point of error, which reads, 'The Court of Civil Appeals erred in holding that the trial court properly defined "unfit and unmerchantable" as that inherent condition which after weighing utility against potential danger, a reasonable person would say makes the use of the product injudicious.'"

The Supreme Court of Texas subsequently overruled Petitioner's Motion for Rehearing on his Application for Writ of Error.

VI. Reasons for Granting the Writ

1. The Writ Should Be Granted Because The Decisions Below Denied To Petitioner A Jury Trial Of His Cause Of Action Against Respondent Based On The Breach Of Implied Warranty Of Fitness, In Violation Of The Fourteenth Amendment To The Constitution Of The United States Of America.

Through the unconstitutional use of the special issue charge which denied Petitioner his right to have the jury pass on his warranty cause of action, the Respondent drug manufacturer, has been granted an exception from the duty of strict liability imposed on other manufacturers of products designed for human consumption and thereby Petitioner has been denied due process and equal protection of the law in violation of the Fourteenth Amendment.

The trial court committed basic and fundamental error by refusing to let the jury pass on the true issues of implied warranty of merchantability and fitness of the drug involved. The special issue charge, as presented to the jury, contained only special issues and definitions based on negligence con-

cepts. The form in which the special issues were presented to the jury permitted the jury to find the Respondent liable only if the jury found that Respondent had knowledge of such facts that its drug would produce a result which ought reasonably to have been foreseen by a person of ordinary care in an appreciable class or number of persons. Every issue presented to the jury was conditioned by the requirement of "foreseeability." The effect of the jury charge was to handcuff the jury and to blind the jury so that it was not given an opportunity to pass on the issues of implied warranty despite the fact that Petitioner properly plead a cause of action in implied warranty and produced substantial evidence that Respondent was guilty of breach of implied warranty, of merchantability and fitness.

In the landmark case of *Decker v. Capps*, 139 Tex. 609, 164 S.W. 2d 828 (1942) and its companion case, *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S.W. 2d 835 (1942) it was held that foreseeability of harm by a defendant who manufactures or sells food for human consumption is not an element in an action on implied warranty; that an action in implied warranty is a tort action of strict liability based on the concept that a food manufacturer and a retailer has the duty to market at their peril only products sold for human consumption that are fit for the purposes for which they were intended; that this strict duty is cast upon such manufacturers and retailers as a matter of public policy irrespective of their knowledge or ability to acquire knowledge of any defects in its products. The reason that such manufacturers and retailers have this duty is that they market a product designed for human consumption; if the product

is defective the consequences are so dangerous to health and life that public policy and sound justice require that the manufacturer, (or the retailer), not the consumer, take the consequences if the product which it manufactures for human consumption is defective.

All of the reasons stated in the *Decker* and *Griggs Canning Co.* cases apply with equal force and logic to Respondent manufacturer. There is no reason to except a drug manufacturer producing drugs for human consumption from the strict tort liability imposed upon manufacturers of food for human consumption. No reasonable distinction can be made between the physical or practical impossibility of obtaining knowledge of defects in food and drugs designed for human consumption. The only reason that such a distinction has been made in this case is because the unlawful special issue charge kept the case proved by Petitioner away from the jury. The effect of the decisions below is to bestow upon Respondent an unwarranted and unconstitutional exception to the Texas law of implied warranty.

The trial court was in fundamental error when it confined the jury's answers to the special issues to the definition of "proximate cause as that cause which produces a result that ought reasonably to have been foreseeable" by Respondent in an appreciable class or number of persons. The trial court compounded that error when it refused to submit Petitioner's tendered definition of "producing cause." Much more consideration was given by another Texas court to the owner of a horse who sued the manufacturer of horse feed for breach of implied warranty in the marketing of horse

feed that killed the plaintiff's quarterhorse. The court, in *Burrus Feed Mills, Inc. v. Reeder*, 391 S.W. 2d 121 (Tex. Civ. App. 1965) held that the doctrine of *Decker v, Capps*, supra, applied to food mixed and processed by the manufacturer and sold for consumption by animals. It held that in a cause of action for breach of implied warranty the definition of proximate cause has no place in the court's special issue charge. It held that the "proximate cause" definition is the proper definition for negligence cases while "producing cause" is the proper definition for implied warranty cases.

The reasoning in the opinion below sustains itself only by its own bootstrap lifting. The opinion uses the jury answer to Special Issue No. Fifteen on "abreaction" to justify the submitted definition of "proximate cause." The jury's answer to Special Issue No. Fifteen was based on a definition of "abreaction" that is patently incorrect. There is no such definition of "abreaction" found in either standard, legal or medical dictionaries. The definition was concocted by Respondent as a means of evading its legal obligation under the doctrine of implied warranty of fitness. The definition is merely a different type of statement of the doctrine of negligence based upon the requirement of the element of foreseeability. The result is a relaxation or an exemption of the Respondent's duty to the public and to Petitioner. The definition was doubly erroneous because it limited the duty of foreseeability by Respondent to users prior to March 2, 1961, an early time in the history of this drug, before the injurious effects of cataracts in at least 3000 users had become apparent and known to the users and to the regulatory authorities and eventually to the public.

The jury's answers were based on hearsay evidence, which hearsay evidence was in fact erroneous, misleading and incorrect because it was limited to an early time in the history of this drug. The opinion below admits that the evidence was heasay but said that it was not reversible error to admit this evidence. However, the effect was an unconstitutional error because the jury was limited to evidence that only nine people out of 442,000 people who took the drug developed cataracts. This was because the jury was bound by the definitions of abreaction and proximate cause, each containing the erroneous requirement that the result of use of the drug ought reasonably to have been foreseen by a person of ordinary care in an appreciable class or number of persons. Thus the jury was completely and effectively blocked from passing on Petitioner's cause of action on implied warranty and blocked from passing on the substantial evidence introduced to support that cause of action.

Faced with such fundamentally erroneous instructions, the jury could not avoid answering Special Issue No. 15 as it did. The court below, reasoning backwards from the jury's answer to Special Issue No. 15, erroneously concluded that the manufacturer of a drug intended for human consumption or intimate bodily use should be held liable on the grounds of implied warranty for injurious results only when such results or some similar results ought reasonably to have been foreseen by a person of ordinary care in an appreciable number of persons in the light of the attending circumstances.

All these reasons also apply to the submitted definition of "unfit and unmerchantable" because that definition also in-

correctly contains the element of foreseeability. When the jury answered Special Issue No. Seven the jury was confined to the dates between August 18, 1960, and March 2, 1961. Therefore the jury necessarily answered that issue as it did, because the definition compelled them to weigh the utility of the drug against its *potential* danger. So here again, the duty and obligation of Respondent was wrongfully measured as of March 2, 1961 or earlier, by its ability to foresee the damaging effects that did in fact develope. The legal duty and obligation of Respondent is responsibility for the damaging effects of its drugs marketed for human consumption irrespective of the ability to foresee that the drug would cause cataracts to develope in the eyes of thousands of consumers.

2. The Texas Special Issue System Is A Snare And A Delusion For Litigants In Petitioner's Position.

No better description of the Texas Special Issue System has been made than that of Judge A. R. Stout, 40th Judicial District, Texas in his article "Our Special Issue System", 36 Tex. L. Rev. 44 (1957). The following constitute some of his more pointed observations:

"Any system which requires a judge to submit self-destructive and contradictory issues, which, if answered as desired, only result in a mistrial or sending the jury back for further deliberation in order to resolve the conflict, is inherently wrong and fundamentally incorrect. Nor has the system been an effective means for the administration of justice. It produces confusion and conflict and is full of error * * * We have gone to seed in our requirements as to the submission of converse or near-converse of affirmative issues so as to pro-

duce conflicts, and we hobble the minds of the jurors during their deliberations so as to promote error. The system has worked more as a bag of tricks than it has to prove or promote the integrity of justice. It serves as an aid to the more powerful and professional litigant and as a deterrent and handicap to those who are not so fortunate. It aids legal sharpers and is productive of shystery both in the law and in the legal profession."

"* * * A system which lawyers everywhere, other than some Texas lawyers, regard in their hearts as a farce." (p. 44). (Further observations of Judge Stout about Texas Special Issues are placed in the footnotes.*)

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* "Tort law should be a simple procedure * * *. However, instead of being simple, it is surrounded with a sort of halo, filled with mumbo-jumbo and enshrouded in fog and mystery. * * *

"Of course, the defendants and professional defenders like and want a technical system that is full of loopholes, pitfalls and errors. (p. 45)

"I would go a little further and say that our special issue system is free insurance in favor of insurance companies and other litigants which is paid in the long run by lesser litigants who can ill afford the charge.

"For my part I would like to come out of the fog and darkness and put on the armor of light for a change and restore our law to that high pinnacle where it has always soared when it is rested upon the bedrock of truth, right, justice and honor." (page 50).

* * * "Whether the insurance companies or other litigants foisted special issues upon us, the simple truth is that they and their cohorts like them, and everyone who has the faculty of blushing knows that they would attempt to combat any effort to change or even to better the system at the front door, the back door, and the side door." (page 51)

* * * "As in other jurisdictions and in the federal courts, jurors should know what they are doing, and lawyers should be allowed to argue the effect of their answers. To deny this right amounts to a virtual denial of the jury system, at least as I see it. In my judgment you cannot and should not try to make a mechanical slot-machine out of human beings if they are competent to do a job. Nor should they be subjected to a system which is calculated to cause them to revile and reject the law rather than to honor it, as they will when the system is ineffective, dishonest, contrary to human nature and full of traps. Nor should we be burdened with

(Continued on following page)

This Honorable Court has refused to let the Texas Special Issue System deprive citizens of their rights under federal law in cases tried in the state courts.

In *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840 (1957) the United States Supreme Court reversed the lower Texas courts in an FELA case where the jury's general verdict that the railroad negligently contributed to the petitioner's injury, had support in the testimony of witnesses, but that the special issues answered by the jury were claimed to be in conflict with this finding and the Court of Civil Appeals held that the special issues controlled. The Supreme Court held that the petitioner having asserted federal rights governed by federal law it was their duty under the act to make certain that they were fully protected and "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under

(Continued from preceding page)
a system which gives a smart man an advantage over one who is untrained in answering trick questions. The very basis of our jury system is that each juror stands on an equal footing with the rest of his peers. (p. 52)

* * * "The real truth is that a potent and sizeable segment of our litigants and lawyers do not believe in the jury system. They may prate loudly about it, and they do want jury trial all right, but they want more the glorification of error and the sporting chance that jury trials under our present system afford. They want more a trial for error than they do a trial by jury. Trials, whether by judges alone or with the aid of a jury, should have some degree of understanding, intelligence and finality. They should never be so dear or costly as to become a luxury to be engaged in only by paupers or millionaires. The average citizen, the middleman, who is the backbone of civilization, should be able to go into a courthouse and have his rights adjudicated with some degree of certainty the same as anyone else. He should be able to do this with an average lawyer within a reasonable time on the same basis as any other litigant whether he be pauper, a millionaire, or a fly-by-night insurance company with a legal trickster for its advocate." (page 53)

the name of local practice." Citing *Davis v. Wechsler*, 263 U.S. 22, 24, 68 L. Ed. 143, 145, 44 S. Ct. 13.

In *Baker v. Texas and Pacific Railway Company*, 359 U.S. 227, 3 L. Ed 2d 756, 79 S. Ct. 664 (1959) it was the petitioners' position that they were deprived of their constitutional right to a jury trial to determine their rights under FELA because the trial judge refused to submit to the jury an issue as to whether the decedent was an employee of the respondent railroad within the meaning of the act. The Texas courts had ruled as a matter of law that the deceased was not in such a relationship to the railroad at the time of his death. This Honorable Court stated:

> "Although we find no decision of this court that has discussed the matter, we think it perfectly plain that the question, like that of fault or of causation under the act, contains factual elements such as to make it one for the jury under the appropriate instructions as to the various relevant factors under the law. See Restatement, Agency 2d, § 220, Comment C; § 227, Comment A. Only if reasonable men could not reach different conclusions on the issue may the question be taken from the jury. See *Chicago, R. I. and PR. Co. v. Bond*, 240 U.S. 449, 60 L. Ed. 735, 36 S. Ct. 403, 11 NCCA 342.

The court then reviewed the evidence, or rather, summarized the evidence and then concluded:

> "An issue for determination by the jury was presented. 'The very essence of * * * [the jury's] function to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria and PUR. Co.*, 321 U.S. 29, 35, 88 L. Ed., 520, 525, 64 S. Ct. 409, 15 NCCANS 647.

In *Davis v. State of N.C.*, 196 F. Supp., 488, (D.C. N.C. 1961) reversed on other grounds, 310 F. 2d 904, it is stated that instructions to the jury are normally matters of state law and procedure not involving constitutional issues, and it is only in circumstances impugning fundamental fairness or infringing specific constitutional protection that a federal question is presented. Petitioner urges that circumstances impugning fundamental fairness and infringing specific constitutional protection exist in this case.

Among cases arising in state courts that have been accepted by this Honorable Court under the Fourteenth Amendment are: *Copperwell Steel Company v. Industrial Commission of Ohio*, Ohio 1945, 65 S. Ct. 1006, 324 U.S. 780, 89 L. Ed 1363, where an employer challenged workmen's compensation awards on the grounds injuries were not suffered in course of employment and unless awards were abrogated employer would be deprived of property without due process of law, and unless relief were afforded employer would be denied equal protection of the laws; *Hansberry v. Lee*, Illinois 1940, 61 S. Ct. 115, 311 U.S. 32, 85 L. Ed. 22, 132 A. L. R. 741, where the Court examined procedure of two state cases to find whether the litigant was "due process of law" and *Senior v. Braden*, Ohio 1935, 295 U.S. 422, which held that the State of Ohio could not label an equitable interest in real estate by a different name in order to tax the interest as personal property.

3. Respondent Drug Manufacturers Obtained the Right To Market MER/29 By Fraud Committed Upon The Food and Drug Administration.

Another reason to grant the writ is that the public records concerning Respondent demonstrate that the conduct and method employed by Respondent in obtaining Food and Drug Administration approval to market MER/29 was criminal, reprehensible, and a violation of its duty to the public. Respondent violated FDA rules regarding disclosure of adverse test results in the use of MER/29. The United States District Court for the District of Columbia, in criminal case No. 1211-63, on June 4, 1964 assessed the maximum fine, a total of $80,000, and imposed a six months' suspended sentence on Respondent being convicted of violation on eight counts of Title 18, Section 1001, U.S.C.A., following entry of a plea of nolo contendre. That statute reads as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowlingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749."

Adverse effects appeared while the drug was being tested by Respondent, but in spite of this Respondent released the drug for public consumption in utter disregard of the public good. Flexman, *MER/29 (Triparaonol) and Cataract*, Med. Trial Tech. Q. 11 (December 1963). According to Congressional records, the Respondent as of 1963 admitted injuries

to 3,000 users of MER/29. The cases then pending against Respondent involve about 600 injured consumers. *Hearings on Inter-Agency, Coordination in Drug Research and Regulation Before the Subcommittee on Reorganization and International Organizations of the Committee on Government Operations*, 88th Cong., 1st Sess. Part 4, at 1955-78 (1963).

In a case recently tried, *Roginsky v. Richardson-Merrell, Inc.* (64 Civil 33), in the Federal District Court for the Southern District of New York (March, 1966), a judgment was entered against the defendant, Richardson-Merrell, Inc., for $17,500 compensatory damages and $100,000 exemplary damages. The judgment for exemplary damages was based on the finding by the jury that the plaintiff had established the elements of his claim that he was injured as a result of Richardson-Merrell, Inc., obtaining the right to market MER/29 by fraud committed upon the Food and Drug Administration in the matter of a submission of data.

CONCLUSION

This drug originally marketed nationally by Respondent as a wonder drug to be a boone to heart victims, proved to be an unfit drug for such purpose. In addition it proved to be a harmful drug causing damaging side effects including cataracts in human eyes. So this drug is not a distinctive product; not a boone to man kind like the Pasteur vaccine as to entitle it to be removed from the main currents of products' liability law.

All of the supposed special attributes of this drug are shared by wide range of products, such as foods, dyes, air-

planes, pesticides, cosmetics, and industrial chemicals. Airplanes, for example cannot be made wholly safe; they fly only because they have been certified by the government; they are essential to the nation's economy. Yet they, and all the other products mentioned above, are not granted any immunity from fault free liability, either by case law or by the Restatement of Torts.

The product failed to live up to the reasonable expectations of Petitioner and he proved that its use has caused him catastrophic and incalculable damage. The jury, blinded and handcuffed by the Special Issue charge, believed they were awarding Petitioner $28,250.00 (Tr. 42). They did not know they had failed to grant Petitioner any recovery. They did not know they had granted Respondent a special, but undeserved exemption, under products liability law.

For the foregoing reasons Certiorari should be granted.

Respectfully submitted,

HARVEY L. DAVIS,
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Dallas, Texas 75205,
Counsel for Petitioner.

APPENDIX A

OPINION, JUDGMENTS AND ORDERS OF COURTS BELOW:

John Herbert CUDMORE, Appellant,

v.

RICHARDSON-MERRELL, INC., et al.,

Appellees.

No. 16638.

Court of Civil Appeals of Texas.
Dallas.

Dec. 17, 1965

Rehearing Denied Jan. 28, 1966.

DIXON, Chief Justice.

This is a products liability case. Appellant John Herbert Cudmore sued appellee Richardson-Merrell, Inc., a pharmaceutical manufacturer, alleging that he had sustained physical injuries as a result of taking a drug manufactured by appellee. Appellee's product is known by its trade name of MER-29. Appellant's suit is based on both negligence and implied warranty.

A jury returned a verdict that appellant had suffered damage in the amount of $28,250 due to cataracts on his eyes, flaking of skin and loss of hair. It also found that the use of MER-29 was not a proximate cause of appellant's cataracts or his loss of hair, but that the use of the drug was the cause of the flaking of appellant's skin. In answering other questions the jury made these findings: during the time appellant took MER-29 the drug was not unmerchantable and

was not unfit for the purpose for which it was intended; appellee had not failed to make such tests of the drug as a person of ordinary care would have made under the same or similar circumstances; at the time of appellant's purchases appellee did not know facts concerning MER-29 which the purchasing public was entitled to receive in addition to the facts which were made known to the public; appellant's cataracts were the result of "abreaction" to MER-29; the state of medical knowledge was such that appellee in the exercise of ordinary care could not have anticipated that the drug would cause cataracts in the human eye; appellant's injuries did not result from a lowering of the level of his cholesterol content; and the state of medical knowledge was such that it could not be ascertained that the lowering of the cholesterol level might cause cataracts, loss of hair or flaking skin.

Based on the above verdict judgment was rendered that appellant take nothing by his suit.

FACTS

The statement of facts in this case is more than 1000 pages in length. We shall undertake only a short summary of it.

In January 1960 appellant suffered a heart attack which required six weeks hospitalization. Pursuant to his physician's perscription appellant in August 1960 began taking MER-29, a new drug which had been on the market only two months. Appellant took a capsule a day until March 1961 when he discontinued taking the drug. While taking the drug he observed loss of hair and flaking of skin. In

the fall of 1961 about four months after he had ceased to take the drug he began to have trouble with his vision. In June 1962 he consulted an eye doctor, who diagnosed his trouble as cataracts in both eyes. There is testimony in the record that appellant's cataracts were caused by MER-29.

It is undisputed that in 1956 MER-29 had been synthesized. Afterward it was sent to one of appellee's biological departments for tests on animals, including rats, dogs and monkeys. In 1958 and 1959 it was tested on about 2000 human patients. In December 1959 at a conference in New Jersey sponsered by appellee, doctors and scientists reported that the drug was efficacious in the reduction of cholesterol There were no reports at the conference of cataracts having been found in any of the patients. In the fall of 1959 a number of laboratory rates developed "corneal opacity"—not cataracts—but it was not clearly shown that such condition was caused by MER-29.

Having heard from another pharmaceutical company that some of its laboratory dogs were developing cataracts, appellee began in March to renew its experiments with its own dogs. The animals were given enormous dosages of the drug. After six months some of the dogs developed cataracts. Some time thereafter some of appellee's laboratory rats also developed cataracts. In October 1961 a doctor at the Mayo Clinic reported the development of cataracts in two persons taking MER/29. Four days later a similar report came from Houston, Texas. Appellee then requested permission from the United States Food and Drug Department to issue a letter of warning which in December 1961 was sent to 230,000

physicians in the United States. On April 17, 1962 appellee addressed a general letter to physicians withdrawing MER-29 from the market.

Some time after appellant ceased to take the drug appellee requested Dr. Ronald M. Burnside, an eye specialist in Dallas, to investigate and report on the frequency of cataracts among patients using MER-29. The doctor testified that his investigation included 86 patients. Five of them had developed cataracts.

OPINION

Special Issues Nos. 2, 4 and 6 inquired of the jury whether MER-29 was a *proximate cause* of (2) appellant's cataracts; (4) the flaking of appellant's skin; and (6) appellant's loss of hair. To Issues Nos. 2 and 6 the jury answered "No". To No. 4 the jury answered "Yes".

In connection with the submission of the above issues the court gave the jury a definition of proximate cause. The definition includes these words: "* * * and which result or some similar result *ought reasonably have been forseen by a person of ordinary care in an appreciable number of persons* in the light of the attending circumstances."

In his fourth, fifth, sixth and seventh points on appeal appellant charges that the court erred in including the element of foreseeability and the phrase "in an appreciable number of persons "in the above definition, and should have predicated Issues Nos. 2, 4 and 6 on *producing cause*, not on *proximate cause*. Producing cause, as appellant describes

it in his objections to the charge, is similar to the court's definition of proximate cause except that it omits entirely the element of foreseeability and the phrase "In an appreciable number of persons".

We think that foreseeability is properly an element in the law of implied warranty in products liability cases such as the one we have before us on this appeal.

We shall not attempt in this opinion to trace the expanding development of the law of products liability. Though much has been written on the subject and many cases involving products liability have been decided we know of no case exactly in point with the case here. This is not a case in which a foreign substance found its way into a bottled drink; it is not a case involving spoiled food; or a case having to do with a mechanical defect in the design of a piece of machinery. It is undisputed here that MER-29 was a pure unadulterated drug intended for intimate bodily use and that it was used by appellant for the very purpose for which it was intended. It consists of the active ingredient triparanol and the "vehicle" in which the triparanol is preserved.

[1, 2] In Texas the rule is well established on grounds of public policy that the law of implied warranty is applicable in products liability cases involving food for human consumption regardless of the lack of privity of contract between the manufacturer and the consumer. Jacob E. Decker & Sons, Inc. v. Capps, et al., 139 Tex. 609, 164 S.W. 2d 828, 142 A.L.R. 1479 (1942). The rule is no doubt applicable in a case involving the use of drugs such as MER-29.

[3] In a case such as this the manufacturer is not charged with the burden of absolute liability—the liability of an insurer. The mere fact that injury followed the use of MER-29 is not alone sufficient grounds for recovery. Bateman, "Products Liability Cases", 27 Tex. Bar. Journal, 9, 41; Wade, "Strict Tort Liability", 19 Southwestern Law Journal, 5, 13, 15.

[4] If the liability of a manufacturer stops short of that of an insurer, where then should the line be drawn marking the limit of his liability? In passing on this question it is to be remembered that this is a case in which appellee pleaded and offered evidence and the jury found that appellant's cataracts were the result of "abreaction" to MER-29 —that appellant belongs to a class of people not appreciable in number who are allergic to the drug. We believe and we hold that in such cases the manufacturer of a drug intended for human consumption or intimate bodily use should be held liable on the grounds of implied warranty for injurious results only when such results or some similar results ought reasonably to have been forseen by a person of ordinary care in an appreciable number of persons in the light of the attending circumstances. We believe our holding finds support in the following authorities: Howard v. Avon Products, Inc., 395 P. 2d 1007, 1011 (Colo. 1964); Esborg v. Bailey Drug Co., 61 Wash. 2d 347, 378 P. 2d 298 (1963); Merril v. Beaute Vues Corp., 235 F. 2d 893, 897 (10th Cir. 1956); Magee v. Wyeth Laboratories, Inc., 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (Cal. 1963); Ray v. J. C. Penney Co., 274 F. 2d 519 (10th Cir. 1959); Ross v. Philip Morris & Co., 328 F. 2d 3

(8th Cir. 1964); Bennett v. Pilot Products Co., 120 Utah 474, 235 P. 2d 525, 26 A.L.R. 2d 958 (1951); Lartigue v. R. J. Reynolds Tobacco Co., 317 F. 2d 19 (5th Cir. 1963). See also Bateman, "Products Liability Cases", 27 Tex. Bar Journal, 9, 41; Wade, "Strict Tort Liability of Manufacturers", 19 Southwestern Law Journal, 5, 15, 22; Keeton, "Products Liability—Liability Without Fault", 41 Tex. Law Rev. 855, 864-865, 870.

[5, 6] For additional reasons appellant's complaint that the court erred in refusing to define "producing cause" and to submit issues predicated thereon cannot be sustained. Appellant did not plead "producing cause". He pleaded that his damages were a "proximate result" of appellee's breach of implied warranty. Further, he did not request issues on "producing cause" by presenting to the court in writing copies of the requested issues which he desired the court to submit, which request under Rule 273, Texas Rules of Civil Procedure must be presented to the court separate and apart from a party's objections to the charge. Preston State Bank v. Nat'l Union Fire Ins. Co., Tex. Civ. App., 320 S.W. 2d 184; McDonald, "Texas Civil Practice", Sec. 12.34, pp. 1155-1156. Appellant's fourth, fifth, sixth and seventh points are overruled.

[7] In his eighth and ninth points on appeal appellant contends that the court erred (8) in including in its definition of "unfit and unmerchantable" the qualifying phrase "after weighing utility against potential danger"; and (9) in not submitting appellant's tendered definition of "unfit and unmerchantable", which was as follows: "Unfit and unmer-

chantable means that inherent condition which a reasonable person would say makes the use of the product injudicious."

The challenged definition was submitted in connection with a special issue in which the jury was asked to answer whether MER-29 was unmerchantable and unfit for the purpose for which it was intended during the time it was used by appellant. The answer of the jury was that the drug was not unfit and unmerchantable.

We see no merit in appellant's contention. Appellant's own witness, Dr. Burnside, on direct examination testified "* * you have to consider the patient's gravity of disease and weigh it with the side effects of the drug; * * *." There is other testimony in the record to the same effect. See Restatement of Torts 2nd, Sec. 402A, Comment k (Tentative draft).

[8] Furthermore, appellant made only a general objection to the court's definition of "unfit and unmerchantable". He did not point out distinctly the matter to which he objected or the grounds of his objection as required by Rule 274, T.R.C.P. Appellant's eighth and ninth points are overruled.

In his tenth and eleventh points appellant asserts that the court erred in defining the term "abrecation" and in overruling appellant's objection to a special issue in which the term was used.

The court defined abrecation as follows:

> "'ABREACTION' means an usual reaction resulting from a person's unusual susceptibility to the product or intended effect of the product in question; that is, such

> person's reaction is different in the presence of the drug in question from that in the usual person. An abreaction is one in which an unusual result is produced by a known or theoretical mechanism of action. An abreaction is one which could not have been reasonably foreseen in an appreciable class or number of potential users prior to "March 2, 1961."

The above definition was given in connection with Special Issue No. 15 which inquired whether the cataracts which appellant developed were an abrecation to MER-29. The jury answered that they were.

[9] In his argument under these two points on appeal appellant says that neither allergy, idosyncrasy or abreaction is a proper defense to an action on implied warranty; and that the above defenses are merely another attempt by appellee to introduce foreseeability into the charge. However, this argument is not embraced in a point of error or in an assignment in the motion for new trial. Therefore the particular complaints will be considered as waived. Rule 374, T.R.C.P.

[10] However, we are of the opinion that the court did not err in submitting the issue and the definition. F. W. Woolworth Co. v. Garza, Tex. Civ. App., 390 S.W. 2d 90; Walstrom Optical Co. v. Miller, Tex. Civ. App., 59 S.W. 2d 895; Howard v. Avon Products, Inc., Colo., 395 P. 2d 1007; Bonowski v. Revlon, Incorporated, 251 Iowa 141, 100 N.W. 2d 5; Grau v. Procter & Gamble Co., 324 F. 2d 309; Hursh, "American Law of Products Liability", Sec. 8:2; Prosser, "The Assault on the Citidel (Strict Liability to the Consumer)", 69 Yale Law Journal, 1144-1145. Appellant's tenth and eleventh points are overruled.

In his first three points on appeal appellant says that the court erred in allowing appellee's witness George Wheatland to testify that he had been informed by an independent market research organization that a survey it had conducted showed that 460,000 persons took MER-29 during the entire time the product was on the market and that 262,000 persons took the drug prior to March 1961, the date when appellant discontinued its use; and the court erred also in overruling appellant's motion to strike said testimony. Appellant objected to the testimony on the ground that it was hearsay.

[11] George Wheatland was a market research manager for appellee. The reports themselves were not introduced into evidence. Wheatland was not a participant as a member of the survey team which compiled the reports. He stated that appellee subscribed to two market surveys reporting firms. They were widely used by manufacturers. He had confidence in the accuracy of the reports.

We agree with appellant that Wheatland's testimony was hearsay and under the circumstances ought not to have been admitted into evidence. We recognize that commercial registers, lists, mortality tables and other reports prepared for and relied on by a trade or profession are often admissible as an exception to the hearsay rule. City Nat'l Bank in Wichita v. Kiel, Tex. Civ. App., 348 S.W. 2d 260, 266; Purvis v. Morehead, Tex. Civ. App., 304 S.W. 2d 221; Western Union Tel. Co. v. Eckhardt, Tex. Civ. App., 2 S.W. 2d 505 (judgment reformed in Tex. Com. App., 11 S.W. 2d 777-778); Pacific Express Co. v. Lothrop, 20 Tex. Civ. App. 339, 49 S.W. 898; San Antonio & A. P. Ry. Co. v. Morgan, Tex.

Civ. App., 46 S.W. 672; Mohr v. Shultz, 86 Idaho 531, 388 P. 2d 1002. But here neither the reports themselves were made available at the trial nor were the authors or any of the compilers presented as witnesses.

Nevertheless we have concluded that the error does not constitute grounds for reversing the judgment in this case. Rule 434, T.R.C.P. We so hold for these reasons:

[12] (1) The testimony that 262,000 people had taken MER-29 was first admitted for the limited purpose of showing the extent of appellee's notice or knowledge. It came from another witness than Wheatland. No objection was made to its admission for that purpose. Later appellant objected to the unlimited admission from the witness Wheatland of the same information.

(2) There is evidence in the record that more than 2000 persons took the drug before it went on the market, none of whom developed cataracts, and that only one person claimed to have developed cataracts before October 1961, which covered the period when appellant was taking the drug. There is evidence also that only nine persons complained during the two years the drug was on the market.

[13] (3) The burden was on appellant to show that he was part of an appreciable class of persons who might have been forseen to have been harmed by MER-29 at the time he was taking it. Howard v. Avon Products, Inc., Colo., 395 P. 2d 1007. Appellant's evidence showed that only 5 of 86 patients examined developed cataracts, and this took place after appellant had ceased to take the drug. All the issues submitted to the jury are directed only to appellee's conduct

and knowledge up to March 1961, when appellant ceased to take MER-29. This was purguant to holdings cited by appellee that appellee's duties and appellant's rights are to be measured as of the time appellant was taking the drug. Howard v. Avon Products, Inc., Colo., 395 P. 2d 1007; Lartigue v. R. J. Reynolds Tobacco Co., 317 F. 2d 19. No objection was made to this limitation in the period of time included in the issues.

(4) The jury found that the drug was not unfit and unmerchantable and that appellant's cataracts were the result of abreaction as that term was defined in the court's charge. The challenged testimony was not direct factual evidence on the above issues. It could have had no more than an indirect and unsubstantial bearing on said issues, consequently will not afford adequate grounds for a reversal of the judgment. Cloud v. Zellers, 158 Tex. 253, 309 S.W. 2d 806; State v. O'Dowd, 158 Tex. 348, 312 S.W. 2d 217; Younger Bros., Inc. v. Myers, 159 Tex. 585, 324 S.W. 2d 546.

[14] (5) In answer to Special Issue No. 16 the jury answered that at the time appellant was taking MER-29 the state of medical knowledge was not such that appellee could reasonably have discovered that MER-29 might cause cataracts. This finding is not attacked by appellant. It stands wholly unchallenged on any ground. The submission of the issue was in keeping with the holding in Lartigue v. R. J. Reynolds Tobacco Co., 317 F. 2d 19, 23, 35.

Appellant's first three points on appeal are overruled.

The judgment of the trial court is

Affirmed.

No. 16,638

JOHN HERBERT CUDMORE

v.

RICHARDSON-MERRELL, INC.

From District Court of Dallas County

Friday, December 17, 1965

Opinion of the Court delivered by Mr. Dixon, Chief Justice

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the court that there is no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee, Richardson-Merrell, Inc., have and recover of and from the appellant, John Herbert Cudmore, and from Commercial Union Life Insurance Company of New York, his surety on appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance.

18021

16638

JOHN HERBERT CUDMORE

v.

RICHARDSON-MERRELL, INC.

Friday, January 28, 1966

This came on to be heard the motion of appellant for rehearing of this cause, and for oral argument thereon, and

the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

IN THE SUPREME COURT OF TEXAS

July 6, 1966

No. A-11324

JOHN HERBERT CUDMORE

v:

RICHARDSON-MERRELL, INC.

From Dallas County

Fifth District

Application of Petitioner for writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, John Herbert Cudmore, and Surety, Commercial Union Insurance Company of New York, pay all costs incurred on this application.

A-15

July 27, 1966

No. A-11324

JOHN HERBERT CUDMORE

v.

RICHARDSON-MERRELL, INC.

From Dallas County

Fifth District

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

APPENDIX B

Rule 277. Special Issues.

In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided that, if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled. Where practicable, all issues should be submitted in the affirmative and in plain and simple language. It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon. In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a

general charge. If the nature of the suit is such that it cannot be determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this rule shall be construed in connection with the succeeding rule. Amended by order of March 31, 1941.

Rule 279. Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect is the issue is one relied upon by the opposing party. Failure to submit a definition

or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 718

JOHN HERBERT CUDMORE, *Petitioner,*

v.

RICHARDSON-MERRELL, INC., *Respondent.*

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas

RESPONDENT'S BRIEF IN OPPOSITION

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November 16, 1966.

WARLICK PRESS, INC.—2323 VALDINA STREET—DALLAS—RI 1-2120

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 718

JOHN HERBERT CUDMORE,

Petitioner,

v.

RICHARDSON-MERRELL, INC.,

Respondent.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas

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RESPONDENT'S BRIEF IN OPPOSITION

To the Supreme Court of the United States:

This is a personal injury case—pleaded, tried, appealed, and decided solely upon issues of Texas common law. No federal statute or cause of action is involved. Petitioner, as plaintiff, brought this suit in a Texas state district court,

where it was tried before a jury. In accordance with Texas practice, and with Petitioner's acquiesence, the fact issues involved were submitted to the jury by means of special interrogatories. (Tr. 37-44.) The jury answered the controlling issues against Petitioner and in favor of Respondent (Tr. 37-44), and the trial court entered judgment on such verdict that Petitioner take nothing against Respondent. (Tr. 47-49.) The Texas Court of Civil Appeals affirmed, *398 S.W. 2d 640*, and the Supreme Court of Texas denied Petitioner's Application for Writ of Error without written opinion. Petitioner conceded in the state courts (and does not deny here) that the jury's findings of fact are sustained by the evidence and support the judgment for Respondent. His position in state court was that, in submitting Petitioner's "implied warranty" count to the jury, the trial court's charge employed language that did not accurately reflect the law of Texas. And, although his Petition for Writ of Certiorari is interlarded with such phrases as "due process," "denial of jury trial," and "unconstitutional," that is his position here. The entire purpose of the Petition for Writ of Certiorari is to obtain further review of points of Texas law that the Texas courts have decided against Petitioner.

OPINION BELOW

The opinion of the Texas Court of Civil Appeals is reported at 398 S.W. 2d 640 and is copied in Appendix "A" to the Petition for Writ of Certiorari. The orders by which the Texas Supreme Court refused Petitioner's Application

for Writ of Error and Motion for Rehearing of his Application for Writ of Error are at pages A-14 and A-15 of the Petition for Writ of Certiorari.

OBJECTION TO JURISDICTION

Petitioner says that the question he seeks to present to the Court is,

> "Whether the Texas courts through the use of the 'special issue' charge to jury have the power to deny Petitioner a jury trial on one of the theories of his cause of action which was properly pled and proved, in violation of Due Process, Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment to the Constitution of the United States." (Petition for Writ of Certiorari 3.)

The Petition for Writ of Certiorari shows on its face that such question was not raised in the trial court (Petition for Writ of Certiorari 7-9) or in the Court of Civil Appeals (Petition for Writ of Certiorari 9-10), that it was not mentioned or ruled upon by the Court of Civil Appeals, *398 S.W. 2d 640* (Petition for Writ of Certiorari Appendix "A"), and that it was not raised in Petitioner's Application for Writ of Error in the Texas Supreme Court (Petition for Writ of Certiorari 11-12) or mentioned or ruled upon in the order which denied such Application for Writ of Error. (Petition for Writ of Certiorari A-14). The Petition further shows that the first and only time *any* federal question was alleged in state court was in the Seventh Point of Petitioner's Motion for Rehearing of his Application for Writ of Error in the Supreme Court of Texas. (Petition for Writ of Certiorari

12-15.)[1] The Texas Supreme Court is without jurisdiction to consider a point first raised at that stage of the proceeding, *Wallace v. Scrogum*, Tex., 372 S.W. 2d 941 (1963); *Ware v. Paxton*, Tex., 359 S.W. 2d 897 (1962); *Moore v. Dilworth*, 142 Tex. 538, 179 S.W. 2d 940 (1944), and it overruled Petitioner's Motion for Rehearing, without an opinion, by an order (Petition for Writ of Certiorari A-15) which read in its entirety as follows:

> "Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled."

Clearly, then, the attempt to raise a federal question came far too late. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); *El Paso & Southwestern R. R. Co. v. Eichel*, 226 U.S. 590, 598 (1913); *Waters-Pierce Oil Company v. State of Texas*, 212 U.S. 112, 118 (1909); *McCorquodale v. State of Texas*, 211 U.S. 432, 436-437 (1908). Petitioner has wholly failed to show, and he cannot show, that his federal question "was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." *Rule 23(f), Rules of the Supreme Court of the United States.*

[1] This Court might well conclude that the federal question Petitioner raised on rehearing in state court is not the same question he presents here. Petitioner's Seventh Point on rehearing in the Texas Supreme Court merely alleged "that the trial court erred in failing to grant the Petitioner a trial by jury of his cause of action against the Respondent based on the breach of implied warranty of fitness * * *." (Petition for Writ of Certiorari 13.) Such Seventh Point did not say or suggest that the alleged denial of a jury trial was caused (as Petitioner now insists) by the use of a special issue charge.

QUESTION PRESENTED

Whether this Court will grant certiorari, in a common law personal injury action tried in state court, to review the decisions of the state trial and appellate courts on issues of state law.

STATUTES INVOLVED

It cannot be accurately said that this case involves any federal statute or constitutional provision. Nor, as the Petition for Writ of Certiorari makes plain, is any state statute really involved. The Petition does say (p. 4) that *Rule 277* and *Rule 279, Texas Rules of Civil Procedure*, are "Statutes Involved,"[2] but, after making the unsupported statement (p. 2) that such Rules violate the Fourteenth Amendment, and after copying them in its Appendix "B," the Petition never mentions such Rules again.

STATEMENT

The following is submitted in lieu of the "Statement" in the Petition for Writ of Certiorari.

After suffering a severe heart attack, Petitioner (plaintiff in the trial court), upon the advice and prescription of his doctor, a heart specialist, took a cholesterol inhibiting drug known as MER/29. Alleging that he had developed cataracts, flaking skin, and loss of hair therefrom, he brought this suit against Respondent, MER/29's manufacturer.

[2] The Texas Rules of Civil Procedure, of course, are not statutes, but it has been said that they do "have the same force and effect as statutes." *Freeman v. Freeman*, 160 Tex. 148, 154, 327 S.W. 2d 428, 433 (1959).

Petitioner's pleadings claimed that his damages had been "proximately" caused by negligence, gross negligence, breach of express warranty, and breach of implied warranty on the part of Respondent. (Tr. 3-15.) At the trial, however, he abandoned the gross negligence and express warranty counts.

The case was tried to a jury for seven days. The more than 1000 typewritten pages of testimony included evidence that MER/29 was a pure, unadulterated product (S.F. 896), developed in response to medical demand for a cholesterol reducing agent (S.F. 202, 618-619); that MER/29 did effectively perform this function (S.F. 167, 658, 852-853); that, after extensive testing, described at length in the evidence (S.F. 275, 393-397, 402-403, 646, 660-662, 839-855), MER/29 was placed on the market, available only by prescription, in June 1960 (S.F. 647); that Petitioner used it from August 1960 to March 1961 (S.F. 36-37); that if Petitioner developed cataracts therefrom, they were an "abreaction"—a reaction that exists in so few people that it is totally unpredictable (S.F. 748, 866); that during the pre-market testing period, MER/29 had been given to more than 2,000 persons (some in enormous dosages), none of whom developed cataracts (S.F. 647); and that from the time MER/29 first went on the market in June 1960, until the time Petitioner ceased to take it in March 1961, it had been used by an estimated 262,000 persons and there had been only *one claim* of cataracts—a claim which was brought to Respondent's attention in February 1961 and, despite extensive investigation, could ever be verified. (S.F. 649, 656.)

The jury found, in answer to the negligence issues, that Respondent did not fail to make adequate tests of MER/29 (Special Issue No. 8) and that Respondent did not conceal facts which the purchasing public was entitled to receive (Special Issue No. 10); it found, in answer to the implied warranty issues, that Petitioner's cataracts and loss of hair were not proximately caused by MER/29 (Special Issues Nos. 2 and 6), that his flaking skin was proximately caused by MER/29 (Special Issue No. 4), and that the MER/29 consumed by Petitioner was not unmerchantable and unfit for the purpose for which it was intended. (Special Issue No. 7.) In answer to special issues which embraced Respondent's defenses to "implied warranty," the jury found that Petitioner's cataracts were the result of an "abreaction" to MER/29 (Special Issue No. 15) and that, at the time Petitioner was taking MER/29, the state of medical knowledge was such that Respondent could not have anticipated in the exercise of ordinary care that MER/29 might cause cataracts in the lens of the human eye. (Special Issue No. 16.)

In answer to Special Issues Nos. 13 and 14, the jury found that Petitioner had sustained $28,250.00 in damages from cataracts, flaking of skin, and loss of hair. There is no evidence or indication that the jury desired or thought that such $28,250.00 would be charged to Respondent. In short, the assertion at page 9 of the Petition for Writ of Certiorari, that the jury "tried to award plaintiff $28,250.00 (Tr. 42) not knowing the effect of their answers to the Special Issues (Tr. 42)," has no support in the record—or, indeed, anywhere else.

Judgment for Respondent was entered on the entire verdict (Tr. 47-49), and Petitioner has never denied in any court that each and all of such findings are fully supported by the evidence.

In the Texas appellate courts, Petitioner devoted approximately one-half of his briefing to an argument, now abandoned, that two items of evidence, received by the trial court, were inadmissible hearsay. He left Special Issues Nos. 8 and 10 and the answers thereto (the findings of no negligence) completely unchalleneged. The remainder of his appellate briefing was devoted to attacks upon the language in which Special Issues Nos. 2 and 7 submitted his count of "implied warranty," and to a contention that Special Issue No. 15 (the issue submitting the defense of "abreaction") should not have been included in the charge at all. He made no attack whatever upon Special Issue No. 16, or the answer thereto (which answer constitutes a complete defense to his "implied warranty" claim), until his Motion for Rehearing in the Court of Civil Appeals.

Before proceeding—we need not labor the point; a jury has decided the material facts against Petitioner and in favor of Respondent—we feel compelled to state that the recital of "Material Facts" at pages 4-5 of the Petition for Writ of Certiorari is not accurate. The record will not support Petitioner's assertions that Petitioner noticed poor vision while he was taking MER/29 (p. 4),[3] that in "almost every in-

[3] Petitioner's own testimony was that he began having difficulty with his vision some *four months after* he had stopped taking MER/29. (S.F. 44.)

stance" the animals being clinically tested on MER/29 "subsequently developed eye disorders" (p. 4),[4] that "[a]fter the drug had been on the market a short time, Respondent received further reports that the drug caused cataracts" (p. 5),[5] and that Petitioner "produced evidence that five persons out of 86 in the Dallas area who had taken the drug developed cataracts as a result thereof" (p. 5).[6] Furthermore, the statements at page 18 of the Petition for Writ of Certiorari, that there have been "injurious effects of cataracts in at least 3000 users," and at page 20 of such Petition, that MER/29 caused cataracts "to develope in the eyes of thousands of consumers," are also without support in the evidence—Petitioner does not even try to cite a record reference for them—and they are untrue.

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[4] The undisputed evidence is that, prior to the marketing of the drug, thousands of animals were tested, and only nine rats and two dogs in Respondent's laboratories had eye complaints, which complaints were not cataracts (S.F. 321, 534, 536; Plaintiff's Exhibits Nos. 21, 22) and the only other report of an eye involvement among any experimental animals came from a University of Florida professor who admitted that the "fragmentary information that can be derived" from her experiments with the drug was "inconclusive." (Defendant's Exhibit No. 11.)

[5] The undisputed evidence is that Respondent received the *first* report of a cataract claim among MER/29 users on February 1, 1961, eight months after MER/29 had gone on the market and one month before Petitioner ceased to use it (S.F. 649), and that the second report of a possible cataract claim occurred in October 1961, seven months after Petitioner had ceased to take MER/29. (S.F. 651.)

[6] A correct summary of the record is as follows. In February 1961, a Dallas doctor, Dr. Burnside, examined patients taking MER/29 to determine its effect upon the cholesterol level. (S.F. 162.) Although Dr. Burnside is an eye specialist, he did not observe cataracts in such persons. (S. F. 212.) Then, in December 1961, after Respondent had received reports of cataract claims, Dr. Burnside, at Respondent's request (S.F. 150), again examined persons in the Dallas area who had taken MER/29. There were more than eighty-six persons involved, but Dr. Burnside attempted to follow closely eighty-six patients (S.F. 217), and formed the opinion that three of them had sustained cataracts from taking MER/29 and that two others were "suspicious." (S.F. 218.) He did not be-

(footnote continued)

At pages 5-8 of the Petition for Writ of Certiorari, Petitioner asks this Court to review, and ultimately to reverse this case on the basis of, several objections to the charge which he says he "timely" made but which, in fact, he did not even make at the present trial. Specifically, we refer to the objection Petitioner cites as "Tr. 20-23" (Petition for Writ of Certiorari, p. 5, line 25), the requested special issues he cites as "Tr. 21, 22" (p. 5, line 27), the requested definition he cites as "Tr. 22" (p. 6, line 3), and the requested definition he cites as "Tr. 21-22" and quotes in full (p. 8, second paragraph), all of which are in a document that was filed on September 8, 1964 (Tr. 20), more than four months before this trial started. There have been two trials of this case. The first, in September 1964, ended with a mistrial after the charge had been prepared and the objections and requested special issues and instructions directed thereto had been filed. (S.F. 2.) The second trial took place in February and March of 1965; *it* is the trial now under review. (Tr. 47.) However, in preparing the appellate Transcript of the present case, the Dallas County district clerk mistakenly included therein, at pages 20-33, not the objections to the charge taken by Petitioner at *this trial*, but, instead, Petitioner's objections, definitions, and requested interrogatories from the *first* trial. When the district clerk's error was discovered, the

(footnote continued)
gin his examinations until December 1961 (nine months after Petitioner had ceased to use MER/29), and he did not report his findings to Respondent until June 1962. (Defendant's Exhibit No. 2.) The undisputed evidence is that, during the time Petitioner was taking MER/29, an estimated 262,000 people used it (S.F. 656, 816-818), and only one person had claimed to have developed cataracts. (S.F. 649, 656.)

original "Transcript" had already been filed in the Court of Civil Appeals, so, at Petitioner's request, the district clerk prepared, and there was filed in the Court of Civil Appeals, a document labeled "Supplemental Transcript," which consists of Petitioner's objections to the charge at *this* trial. Both the "Transcript" and the "Supplemental Transcript" have been certified to this Court, but the objections to the charge in the "Supplemental Transcript" are the only objections Petitioner ever made to the charge now under review. The objections and requests in the "Transcript" (the document Petitioner cites as "Tr.") were made and tendered at another trial and directed to a different charge.

ARGUMENT

I. The only issues in this case are issues of Texas common law.

Although the section labeled "Reasons for Granting the Writ" consumes pages 15-26 of the Petition for Writ of Certiorari, the only part of such section that has any bearing upon, or even mentions, the present case is the argument at pages 15-20. There, Petitioner complains that the portion of the charge which submitted his cause of action in "implied warranty" to the jury—i.e., Special Issues Nos. 2 and 7 and the definitions accompanying them—were "based on negligence concepts." (Petition for Writ of Certiorari 15-16). He contends that, in this respect, the charge did not follow the

Texas common law as set out in other Texas cases. (Ibid. 16-18.)[7] An analysis of the Petition shows that this general contention, which is hardly of constitutional proportions, consists only of two still narrower specific complaints.

Petitioner's first complaint—the only one he argues at any length—is that the trial court, he says, should not have submitted Special Issue No. 2, which inquired whether MER/29 was a "proximate cause"[8] of his cataracts, but, instead, should have submitted a special issue that inquired whether MER/29 was a "producing cause"[9] of such cataracts. (Petition for Writ of Certiorari 17-19.) In other words, he says that the charge should not have required him to prove that his cataracts "ought reasonably to have been foreseen" by Respondent "in an appreciable class or number of persons." He made this same argument under his Points of Error Nos. Four, Five, and Six in the Texas Court of

[7] The only such cases mentioned by Petitioner are *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W. 2d 828 (1942); *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S.W. 2d 835 (1942); and *Burrus Feed Mills, Inc. v. Reeder*, 391 S.W. 2d 121 (Tex. Civ. App., 1965), no writ history.

[8] The trial court defined "proximate cause" as "that cause which in its natural and continuous sequence unbroken by any new and independent cause, produces a result, and without which cause, such result would not have occurred, and which result or some similar result ought reasonably to have been foreseen by a person of ordinary care in an appreciable class or number of persons, in the light of the attending circumstances. There may be more than one proximate cause of a result." (Tr. 36.)

[9] In his Motion for New Trial (Tr. 50-51), but not at the trial (Supp. Tr. 3-6), Petitioner tendered the following definition of producing cause: "a cause which in natural and continuous sequence, either alone or in conjunction with pre-existing body condition, brings about a condition of incapacity, and without which cause such incapacity would not have occurred. There may be more than one producing cause of a person's incapacity."

Civil Appeals (Petition for Writ of Certiorari 9-10), and to that court he described the essence of such argument as follows:

> "In essence, the question raised by the three points of error presented hereunder is whether in a case of products liability based on the implied warranty of fitness imposed by law *the plaintiff has the burden of proving as a requisite to recovery that the damages he sustained from using the product, in a manner in which it was designed to be used, were reasonably foreseeable by the defendant.* This is not the law of the State of Texas * * *." (Petitioner's Brief in Court of Civil Appeals 17, emphasis Petitioner's.)

Petitioner's other complaint is that, in submitting Special Issue No. 7 (whether the MER/29 consumed by Petitioner was unfit and unmerchantable), the trial court gave an inaccurate definition of "unfit and unmerchantable." (Petition for Writ of Certiorari 19-20.) The trial court defined "unfit and unmerchantable" as "that inherent condition which, after weighing utility against potential danger, means that a reasonable person would say that its use is injudicious." (Tr. 36.) Petitioner says that the phrase "after weighing utility against potential danger" should not have been included in the definition. (See Petitioner's Points of Error Nos. Eight and Nine in the Court of Civil Appeals, quoted at Petition for Writ of Certiorari 10, and his Thirteenth Point in the Texas Supreme Court, quoted at Petition for Writ of Certiorari 12.) In the Texas appellate courts, the sole reason he assigned in support of such contention was, not that the trial court's definition was unconstitutional, or even that it was "based on negligence con-

cepts," but simply that it was a "comment on the weight of the evidence." (Petitioner's Brief in Court of Civil Appeals 30; Petitioner's Application for Writ of Error in Supreme Court 37.)

Simply to state these contentions is to demonstrate that by no stretch of the imagination can it be said that any of them so much as touches on a constitutional problem. In particular, there is not the remotest connection—and Petitioner does not even try to suggest one—between those arguments and his claim, first asserted in this Court, that he was deprived of constitutional rights by the use of a special issue charge. Whether Special Issue No. 2 should have been phrased in terms of "producing cause" instead of "proximate cause," whether or not the definition accompanying Special Issue No. 7 was correct, whether Special Issues Nos. 2 and 7 use the language of "negligence concepts" instead of "implied warranty concepts"—these are nothing but issues of Texas common law, and, as his briefs make clear, Petitioner himself so recognized in the Texas courts.

II. The Court of Civil Appeals properly disposed of the issues in this case, and was correct in affirming the trial court's judgment.

Even if this Court were inclined to review a state decision on common law issues, there is no reason for it to do so in this case. For the many reasons set out in this section, the issues herein have been correctly decided and a judgment for Respondent was required.

In the first place, there is no merit to Petitioner's claim that the trial court made, or that the appellate courts ap-

proved, a submission of his "implied warranty" action on the basis of "negligence concepts."

Petitioner's contrary argument is founded upon a misapprehension as to the nature of this case. He says the Texas courts have made herein "an unwarranted and unconstitutional exception to" *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W. 2d 828 (1942); *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S.W. 2d 835 (1942); and *Burrus Feed Mills, Inc. v. Reeder*, 391 S.W. 2d 121 (Tex. Civ. App., 1965), no writ history. The present case, however, constitutes no exception at all to those precedents; it is simply a different kind of case. *Decker*, *Josey*, and *Burrus* involved contaminated or adulterated products.[10] This case involves a product, MER/29, that was pure and uncontaminated and unadulterated and served its intended purpose, and the plaintiff seeks damages because of an alleged reaction to MER/29 which (despite nationwide use, and despite testing that has been established as sufficient by an unchallenged jury finding, Special Issue No. 8) had been complained of by only one other consumer from the synthesis of MER/29 in 1956 until the day Petitioner ceased to use it in 1961. The authorities agree that the contaminated product cases and this kind of case are "fundamentally different" and that "the impact of policy considerations demand that a distinction be made between them." *Keeton, "Products Liability—Liability Without Fault and the Requirement of a Defect,"* 41 Tex. L. Rev. 855, 859 (1963). What Petitioner mistakes for an exception to the contaminated products cases, and for a submission

[10] *Decker* involved contaminated sausage, *Josey* adulterated spinach, *Burrus* poisoned horse feed.

"based on negligence concepts," is a submission based on the implied warranty concepts applicable to this type of case.

The doctrine of implied warranty requires a pure product, an uncontaminated product, but, contrary to Petitioner's position, it does not require the manufacturer to discharge the impossible duty of furnishing a product which is absolutely safe for every possible user under all possible conditions. The requirement is that the product not be "unreasonably dangerous." *Restatement of Torts* 2d § 402A (1965). As said by an eminent authority on the subject, *Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)*," 69 Yale Law Journal 1099 (1960):

> "[T]he seller may expect, within some reasonable limits, that the product will be used by normal persons, and that he will not be held responsible when some idiosyncracy peculiar to the plaintiff makes him abnormally sensitive to a product quite harmless to ordinary people." (69 Yale L. J. 1144-1145.)

Accordingly, it is held by the overwhelming (if, indeed, not the unanimous) weight of authority that the "implied warranty" attending a product such as MER/29 does not run in favor of one who suffers an idiosyncratic or allergic reaction thereto unless such reaction is common to a reasonably substantial portion of the population; so that when, as here, evidence is produced that the plaintiff's reaction is allergic or idosyncratic, the plaintiff cannot recover under implied warranty upon proof merely that he consumed the product and that he sustained injury therefrom. He must *also* prove, as a condition to recovery, that, at the time the product was sold to him, the injuries of which he complains were common to a reasonably foreseeable and appreciable class or number

of potential users of the product. *Esborg v. Bailey Drug Co.*, 61 Wash. 2d 347, 378 P. 2d 298 (1963); *Cochran v. Brooke*, Ore., 409 P. 2d 904 (1966); *Howard v. Avon Products, Inc.*, 155 Colo. 444, 395 P. 2d 1007 (1964); *Crotty v. Shartenberg's-New Haven, Inc.*, 147 Conn. 460, 162 A. 2d 513 (1960); *Casagrande v. F. W. Woolworth Co.*, 340 Mass. 552, 165 N.E. 2d 109 (1960); *Ray v. J. C. Penney Company*, 274 F. 2d 519 (10 Cir., 1959); *Magee v. Wyeth Laboratories, Inc.*, 29 Cal. Rptr. 322 (Cal. App., 1963); *Merrill v. Beaute Vues Corp.*, 235 F. 2d 893 (10 Cir., 1956); *Restatement of Torts* 2d §402A, comment j (1965). This, to repeat, is not a "negligence concept." It is an "implied warranty concept" that *must* be included in the charge in the type of implied warranty case shown by this record. Neither in this Court nor in any other has Petitioner ever cited a single authority to the contrary.

The foregoing answers Petitioner's complaints with respect to Special Issue No. 2. Petitioner would have had the trial court require him to prove only that he developed cataracts from MER/29—i.e., that MER/29 was a "producing cause" of his cataracts. Under the law of implied warranty as it applies to this record, Petitioner had to prove and obtain jury finding not only (1) that MER/29 caused his cataracts but also (2) that, at the time he used MER/29, such result was common to a reasonably foreseeable and appreciable class or number of potential users of MER/29. The trial court included both of these requirements by appropriate definition of the term "proximate cause," as used in

Special Issue No. 2.[11] The court was correct in so doing and would have been in error if it had acceded to Petitioner's request that the second element of Petitioner's proof be eliminated from the charge.

Furthermore, as noted by the Court of Civil Appeals:

> "For additional reasons appellant's complaint that the court erred in refusing to define 'producing cause' and to submit issues predicated thereon cannot be sustained. Appellant did not plead 'producing cause'. He pleaded that his damages were a 'proximate result' of appellee's breach of implied warranty. Further, he did not request issues on 'producing cause' by presenting to the court in writing copies of the requested issues which he desired the court to submit, which request under Rule 273, Texas Rules of Civil Procedure must be presented to the court separate and apart from a party's objections to the charge." 398 S.W. 2d 645.

Either of these additional reasons, in and of itself, is a sufficient basis for affirming the manner in which the trial court submitted Special Issue No. 2. It is settled Texas law that there is no error in refusing a requested submission that is not made by the pleadings, *Matthews v. General Accident Fire & Life Assur. Corp.*, 161 Tex. 622, 343 S.W. 2d 251 (1961), or tendered in compliance with the Texas Rules of Civil Procedure. *Texas Employers' Insurance Association v. Jones*, Tex., 393 S.W. 2d 305 (1965). The Petition for Writ of Certiorari nowhere contends otherwise or even mentions these holdings by the Court of Civil Appeals.

[11] As observed by the court in *Howard v. Avon Products, Inc.*, 155 Colo. 444, 395 P. 2d 1007 (1964), this element of Petitioner's proof—that his reaction was common to a substantial or appreciable class of persons—can be expressed in many different ways. The trial court in this case chose the language employed by the Washington Supreme Court in *Esborg v. Bailey Drug Co.*, 61 Wash. 2d 347, 378 P. 2d 298, 304-305. Petitioner did not object to the manner in which the concept was phrased, but stood entirely upon his position that it should not be included in the charge at all.

As to Petitioner's complaint with respect to Special Issue No. 7, that the trial court's definition of "unfit and unmerchantable" was inaccurate, the definition is in accord with expert legal analysis—it is recommended by the article, *Keeton, "Products Liability—Current Developments,"* 40 Tex. L. Rev. 193, 210 (1961)—and, moreover, is nothing but simple common sense. Petitioner's own doctor testified that, in deciding whether to prescribe a drug—i.e., whether the drug is fit and merchantable—"you have to consider the patient's gravity of disease and weigh it with the side effects of the drug" (S.F. 222), just as the definition says. The Court of Civil Appeals held (1) that the definition was accurate and (2) that Petitioner could not attack it on appeal because at the trial he

> "made only a general objection to the court's definition of 'unfit and unmerchantable'. He did not point out distinctly the matter to which he objected or the grounds of his objection as required by Rule 274, T.R.C.P." 398 S.W. 2d 645.

The Petition for Writ of Certiorari makes no logical attack upon the first of these holdings and no attack at all upon the second.

There was no error (let alone any properly assigned error) in the submission of Petitioner's count of implied warranty. Furthermore, even if there had been, such error or errors would be immaterial, for two separate and independent reasons.

1. In answer to Special Issue No. 15, the jury found that Petitioner's cataracts resulted from an idiosyncratic reaction —an abreaction—to MER/29. (Tr. 43.) This finding is a complete defense to Petitioner's count of implied warranty.

Hursh, "American Law of Products Liability," § 8:2 (1961); 26 A.L.R. 2d 963 (1952); *Howard v. Avon Products, Inc.*, 155 Colo. 444, 395 P. 2d 1007 (1964); *Bonowski v. Revlon, Inc.*, 251 Iowa 141, 100 N.W. 2d 5 (1959); *Grau v. Proctor & Gamble Company*, 324 F. 2d 309 (5 Cir., 1963). Petitioner has never denied that this finding is fully supported by the evidence. The only argument he directed toward it in the Court of Civil Appeals had not been preserved on motion for new trial,[12] and, therefore, the Court of Civil Appeals declined to consider it, 398 S.W. 2d 645, and properly so. *St. Louis Southwestern Railway Company v. Gregory*, Tex., 387 S.W. 2d 27 (1965).

2. In answer to Special Issue No. 16, the jury found that, at the time Petitioner was using MER/29, the state of medical knowledge was such that Respondent could not, in the exercise of ordinary care, have anticipated that MER/29 could cause cataracts in the lens of the human eye. (Tr. 43.) This finding is another complete defense to Petitioner's count of implied warranty. *Lartigue v. R.J. Reynolds Tobacco Company*, 317 F. 2d 19 (5 Cir., 1963), cert. den. 375 U.S. 865 (1963); *Ross v. Philip Morris & Company*, 328 F. 2d 3 (8 Cir., 1964); *Restatement of Torts 2d*, § 402A, comment j (1965); *Keeton, "Products Liability—Liability Without Fault and the Requirement of a Defect,"* 41 Tex. L. Rev. 855, 869 (1963). Petitioner has never denied that this find-

[12] Such argument was that Special Issue No. 15 was "evidentiary." (Petitioner's Brief in Court of Civil Appeals 31.) See also Petitioner's Application for Writ of Error 37, where Petitioner contended only that such Issue was a "comment on the weight of the evidence." The argument, at Petition for Writ of Certiorari 18, that there is no such thing as an abreaction, is made here for the first time in any court and is contrary to the undisputed evidence. (See S.F. 674, 866.)

ing is fully supported by the evidence. He made no attack thereon at all in his motion for new trial or on original submission in the Court of Civil Appeals. See 398 S.W. 2d 647. His first challenge to that issue was on rehearing in the Court of Civil Appeals, at which time such Court was without jurisdiction to consider it, *Lone Star Gas Company v. Sheaner*, 157 Tex. 508, 305 S.W. 2d 150 (1957); *Aycock v. Travis County*, 255 S.W. 2d 910 (Tex. Civ. App., 1953), writ refused, and did not consider it.

Thus, even if the trial court had submitted Special Issue No. 2 in terms of "producing cause" and had accompanied Special Issues No. 7 with a definition of "unfit and unmerchantable" that was satisfactory to Petitioner, and even if Petitioner had then obtained favorable findings upon such issues, Petitioner would have been no better off, because *either* the unchallenged answer to Special Issue No. 15 *or* the unchallenged answer to Special Issue No. 16, each being a complete defense to his implied warranty action, requires a judgment, irrespective of the answers to Special Issues Nos. 2 and 7, that he take nothing against Respondent—the same as the judgment of the trial court in this case. See *Wortham v. Bull*, 19 S.W. 2d 211 (Tex. Civ. App., 1929), writ refused.

In summary, there are at least five separate and independently sufficient reasons why Petitioner's objections to the language in which the charge submitted his count of "implied warranty" constitute no basis for granting certiorari.

1. Such objections raise no federal issues.

2. Such objections were not well taken; the charge was correct.

3. Such objections were not properly preserved at the trial for appellate review; this fact was pointed out by the Court of Civil Appeals and has never been denied by Petitioner.

4. Such objections are immaterial because the jury's answer to Special Issue No. 15 (a complete defense to which Petitioner made no tenable challenge in the Texas courts) is sufficient, in and of itself, to support and compel the judgment for Respondent.

5. Such objections are immaterial because the jury's answer to Special Issue No. 16 (a complete defense to which Petitioner made no challenge at all in the Texas courts until it was far too late) is sufficient, in and of itself, to support and compel the judgment for Respondent.

III. The Petition for Writ of Certiorari does not and cannot show that the Texas special issue practice is unconstitutional.

There is no need to dwell upon Petitioner's argument (raised here for the first time in any court) that the Texas special issue practice (to which he consented in this case[13]) is unconstitutional. He cites no authority in support of his

[13] Under *Rule 277, Texas Rules of Civil Procedure,* a case may be submitted on a general charge "for good cause" or "on agreement of the parties." (See Petition for Writ of Certiorari B-1.) Petitioner made no attempt to obtain such an agreement nor any request for a general charge.

contention,[14] and there is none. Indeed, a similar practice is specifically authorized for use in the federal courts by *Rule 49(a), Federal Rules of Civil Procedure.* See *Edward E. Morgan Co. v. U.S.*, 230 F. 2d 896, 900 (5 Cir. 1956), cert. den. 351 U.S. 965 (1956).

The cases cited at pages 22-24 of the Petition for Writ of Certiorari are not even remotely in point. Two of them, *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360 (1957), and *Baker v. Texas & Pacific Ry. Co.*, 359 U.S. 227 (1959), were FELA cases; the instant case arises under state common law. Two others, *Copperweld Steel Company v. Industrial Commission of Ohio*, 324 U.S. 780 (1945) (in which, incidentally, certiorari was denied), and *Senior v. Braden*, 295 U.S. 422 (1935), involved the constitutionality of state statutes; no such issue is presented here. *Hansberry v. Lee*, 311 U.S. 32 (1940), was concerned with whether, as a matter of due process, one can be bound, under res judicata, by an in personam judgment to which he was not a party; and *Davis v. North Carolina*, 196 F. Supp. 488 (D.C.N.C. 1961), reversed, 310 F. 2d 904 (4 Cir., 1962), was a criminal case. None of these authorities has anything to do with implied warranty (let alone holds that Petitioner's objections to the

[14] The only authority he cites is a speech by a Texas district judge, which criticises special issues in strong (not to say intemperate) language, but never once suggests that their use violates any constitutional provision. The leading Texas authority on the subject concedes that the special issue system has some defects, but finds it preferable to the general verdict. Stayton, *"Texas' Approaches to the Parker Ideal and Her Shortcomings,"* 37 Tex. L. Rev. 845, 855 (1959). See *Barron and Holtzoff, Federal Practice and Procedure*, §1051 (1961).

charge either raise constitutional questions or have any merit); none of them even suggests that special issues are unconstitutional.

Before concluding, we note that Petitioner has nowhere tried to show, either by citation of authority or by attempt at logical analysis, just how the use of a special issue charge could possibly have prejudiced him in this case. The reason, we submit, is that he could not have made such a showing. Petitioner's real complaint is, not that a special issue charge was used, but that such charge did not conform to his notions of what the Texas law of implied warranty ought to be.

IV. The matters outside the record upon which Petitioner relies are immaterial to the issues in this case.

Unable to cite any law to support his theories, unable to find any helpful facts in evidence, Petitioner is reduced, at pages 25-26 of the Petition for Writ of Certiorari, to a demand that this Court grant certiorari on the basis of his own inflammatory assertions with respect to matters completely outside the record. Such an argument need not be dignified by lengthy reply. Petitioner has told this Court that the question he presents is whether the trial court had the right to employ a special verdict. He does not even try to show that the allegations at pages 25-26 of the Petition have anything to do with that issue, with the issue Petitioner really wants reviewed (whether the state courts have correctly applied the Texas law of implied warranty), or with any other issue in this case.

CONCLUSION

There is no federal question here, let alone a federal question timely and properly raised. The only issues are issues of state common law, and they were correctly decided by the Texas courts. Petitioner has shown nothing, and there is nothing, that could begin to justify review of this case by the Supreme Court of the United States. Respondent prays that certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Jack Pew, Jr., one the Counsel for Respondent, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 15th day of November, 1966, I served a copy of the foregoing Respondent's Brief in Opposition by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Harvey L. Davis, 3315 Daniels, Dallas, Texas, 75205, Counsel for Petitioner.

Jack Pew, Jr.

Jack Pew, Jr.